IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 12, 2008 Session

IN THE MATTER OF: THE ESTATE OF EMMA KELLEY HUTCHERSON

Appeal from the Circuit Court for Davidson County
No. 07P798 Hamilton Gayden, Judge

No. M2007-02747-COA-R3-CV - Filed October 29, 2008

The decedent's last surviving child, who claims that a photocopy of a forty year old handwritten document is his mother's last will and testament, appeals the finding that the proof was insufficient to admit the document to probate. The administration of this estate was initiated when a granddaughter of the decedent filed a petition to open her grandmother's estate. She sought either to admit the photocopy of the holographic document to probate or, in the alternative, to open an intestate estate. The son filed an answer to the petition asserting the photocopy of the holographic document should be admitted to probate as his mother's last will and testament. Following a hearing on the petition, the trial court denied the petition to admit the purported will to probate and, alternatively, appointed the petitioner as the administratrix of her grandmother's intestate estate. The son then filed a Motion to Set for Final Hearing and Stay Sale of Real Property, alleging that he was not allowed to put on evidence at the first hearing. Following a hearing on the motion, the trial court entered an order stating that the son had expressly waived his right to present evidence at the prior hearing and affirmed its earlier ruling. On appeal, the son contends the petitioner had an affirmative duty to prove the photocopy of the holographic document was his mother's last will and testament and failed to fulfill that duty, and that the trial court erred by not allowing him to put on proof. We have determined that the petitioner, the granddaughter who obtained a photocopy of the holographic document, fulfilled her duty by delivering the purported testamentary instrument to the probate court. We have also determined that the son waived his right to put on proof. The evidence in the record is wholly insufficient to establish that the photocopy of the holographic document was the last will and testament of the decedent. We therefore affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Robert J. Turner, Nashville, Tennessee, for the appellant, John Wesley Hutcherson, Jr.

David Kennedy, Jr., Nashville, Tennessee, for the appellee, Elizabeth Vantrease.

OPINION

The decedent, Emma K. Hutcherson, died on December 16, 1989. Ever since Mrs. Hutcherson's death, her son John Wesley Hutcherson has resided in his mother's home at 705 Campbell Road. Although other heirs had an intestate interest in her former residence, no heir took any action to administer the estate of Mrs. Hutcherson for the next eighteen years. That changed on May 18, 2007, when her granddaughter, Elizabeth Vantrease, filed a Petition for Probate of Testamentary Instrument; or in the Alternative, For Granting Letters of Administration. In the petition, Ms. Vantrease asked that she be appointed the personal representative for the estate.

Attached to the petition was a photocopy of a document purportedly written by Mrs. Hutcherson, dated July 10, 1968, which stated:

> This is my only will.
>
> This concerns my house at 705 Campbell Road.
>
> This house shall not be sold as long as any of my children [n]eed it as a home, and are able to keep it in good repair. Those living in this home must help with the upkeep of this property.
>
> May God bless all of you.
>
> Your mother
>
> Emma K. Hutcherson.

John Wesley Hutcherson, the only surviving child of the decedent, was served with a copy of the petition. He engaged the services of an attorney who filed an answer on his behalf, requesting that Mr. Hutcherson be named the personal representative of his mother's estate instead of Ms. Vantrease. Mr. Hutcherson also stated that the photocopy of the will demonstrated the decedent's intent that her home remain with her children, of which he was the last surviving child. He also contended that the photocopy of the purported holographic will should be admitted to probate.

On August 17, 2007, a hearing was held in the Circuit Court of Davidson County. Mr. Hutcherson and his attorney appeared at the hearing on the petition, as did Ms. Vantrease and her attorney. No evidentiary transcript of the hearing was made. Following the hearing, an Order for Intestate Administration was entered on September 6, 2007, which held that the photocopy of the holographic document was not a valid testamentary instrument. Thus, instead of admitting the document to probate, the trial court appointed Ms. Vantrease as the Administratrix of the decedent's intestate estate. The trial court also allowed Mr. Hutcherson to remain in the decedent's residence for six months, following which, the home was to be listed with a real estate agent and sold.

On October 4, 2007, Mr. Hutcherson filed a Motion to Set for a Final Hearing and Stay Sale of Real Property.[1] Mr. Hutcherson alleged that he was denied an opportunity to testify or to put on witnesses at the August 17 hearing on Ms. Vantrease's petition and requested an opportunity for a full evidentiary hearing on the validity of the purported holographic will. Ms. Vantrease filed a response to the motion in which she disputed Mr. Hutcherson's characterization of what occurred at the August 17 hearing. She asserted that counsel for both parties made "exhaustive arguments" regarding the photocopy of the holographic document, and that the trial court "specifically asked if any party wished to present testimony or other evidence." She also stated that Mr. Hutcherson did not offer to provide any evidence, other than photographs of a house that he owned.[2]

The trial court denied Mr. Hutcherson's motion in an order on November 13, 2007. The court found that Mr. Hutcherson had waived his opportunity to put on proof that the 1968 holographic document was a valid will and the court found that he failed to put on proof to rebut the presumption that it had been revoked. The court also ruled that even had such proof been presented, the instrument was insufficient as a testamentary devise and defective on its face and, therefore, invalid as a last will and testament. Mr. Hutcherson appeals.

ANALYSIS

The standard of review of a trial court's findings of fact is de novo and we presume that the findings of fact are correct unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Rawlings v. John Hancock Mut. Life Ins. Co.*, 78 S.W.3d 291, 296 (Tenn. Ct. App. 2001). For the evidence to preponderate against a trial court's finding of fact, it must support another finding of fact with greater convincing effect. *Walker v. Sidney Gilreath & Assocs*., 40 S.W.3d 66, 71 (Tenn. Ct. App. 2000); *The Realty Shop, Inc. v. R.R. Westminster Holding, Inc.*, 7 S.W.3d 581, 596 (Tenn. Ct. App. 1999). Where the trial court does not make findings of fact, there is no presumption of correctness and we "must conduct our own independent review of the record to determine where the preponderance of the evidence lies." *Brooks v. Brooks*, 992 S.W.2d 403, 405 (Tenn. 1999). We also give great weight to a trial court's determinations of credibility of witnesses. *Estate of Walton v. Young*, 950 S.W.2d 956, 959 (Tenn. 1997); *B & G Constr., Inc. v. Polk*, 37 S.W.3d 462, 465 (Tenn. Ct. App. 2000). Issues of law are reviewed *de novo* with no presumption of correctness. *Nelson v. Wal-Mart Stores, Inc*., 8 S.W.3d 625, 628 (Tenn. 1999). Mixed questions of law and fact are subject to a different standard of review. *Bubis v. Blackman*, 435 S.W.2d 492, 498 (Tenn. Ct. App. 1968).

A mixed question of law and fact arises where the construction of a written agreement depends on extrinsic facts as to which there is a dispute. *Hibernia Bank & Trust Co. v. Boyd*, 48

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[1] Mr. Hutcherson hired new counsel in the interim.

[2] The purported will stated that Mrs. Hutcherson's children could live there "so long as they needed it as a home." Ms. Vantrease contended that Mr. Hutcherson did not need to reside in Mrs. Hutcherson's home because he had his own residence. Photographs of Mr. Hutcherson's house were introduced by Mr. Hutcherson's attorney to prove that his house was so dilapidated that it was uninhabitable.

S.W.2d 1084 1086-1087 (Tenn. 1932); see *State ex rel. Moretz v. City of Johnson City*, 581 S.W.2d 628, 631 (Tenn. 1979) (holding that the interpretation of a written instrument, usually a question of law, may become a mixed question of law and fact, and that the question of "reasonableness" is a mixed question of law and fact); *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 305 (Tenn. 2005) (holding a constitutional claim that is resolved after an evidentiary hearing generally presents a mixed question of law and fact).

A presumption of correctness does not attach to mixed questions of law and fact, but as with questions of law, this court has the latitude to determine whether findings as to mixed questions of fact and law made by the trial court are sustained by probative evidence on appeal. *Aaron v. Aaron*, 909 S.W.2d 408, 410 (Tenn. 1995); citing *Murdock Acceptance Corp. v. Jones*, 362 S.W.2d 266, 268 (Tenn. Ct. App. 1961). Our standard of review of rulings on mixed questions of law and fact is *de novo* with a presumption of correctness extended only to the lower court's findings of fact. *Abdur'Rahman v. Bredesen,* 181 S.W.3d 305, citing *Carpenter v. State*, 126 S.W.3d 879, 886 (Tenn. 2004).

I.

On appeal, Mr. Hutcherson contends that Ms. Vantrease had the burden of advocating and proving that the handwritten document was Mrs. Hutcherson's last will and testament. Mr. Hutcherson erroneously bases this contention on case law that places an affirmative duty on a named executor to present evidence supporting the validity of a purported testamentary document. *See, e.g. Eslick v. Friedman*, 235 S.W.2d 808, 810 (Tenn. 1951); *Smith v. Harrison*, 49 Tenn. 230, 243-44 (Tenn. 1937). Mr. Hutcherson's reliance on this principle is misplaced because Ms. Vantrease was not identified in the purported will; therefore, the cases upon which he relies are inapplicable.

Ms. Vantrease did, however, have an affirmative duty to mail or deliver what appeared to be a testamentary instrument to the probate court. Tennessee Code Annotated § 32-1-113 provides:

> (a) Any person or corporation who has possession of or discovers a written instrument purporting to be the last will and testament of a decedent shall mail or deliver that instrument to the personal representative named in the instrument as soon as the person or corporation has knowledge of the death, and a photographic copy of the instrument shall be mailed or delivered to the clerk of the court having probate jurisdiction in the county of the decedent's residence.
> (b) (1) If the personal representative, or the personal representative's address, is not known, is deceased or is not eligible to serve;
> (2) *If the instrument does not name a personal representative*;
> (3) If the personal representative declines to serve; or
> (4) If it appears that there is no estate that will require administration;
> *then the person having possession of the original instrument shall mail or deliver it to the clerk.*

> (c) *The receipt by the personal representative or the clerk shall relieve the person of further responsibility as to possession of the instrument*.
> (d) The clerk of the court shall have no responsibility to perform any acts regarding the probate of the will and shall not accept any claims for filing against the estate unless and until the personal representative or other interested party files proper pleadings to initiate such an action.

Tenn. Code Ann. § 32-1-113 (emphasis added); *see also* 1 Jack W. Robinson, Sr., Jeff Mobley & Andrea J. Hedrick, Pritchard on Wills and Administration of Estates §331 (6th ed. 2007) ("The custodian of wills cannot remain passive. Either the one named as the executor or anyone else having it in possession or knowing where it is may be summoned to appear before the probate court and required to surrender it or give testimony in regard to its existence or place of deposit.")[3]

Ms. Vantrease fulfilled her duty by delivering the purported testamentary instrument to the clerk. She did not have an affirmative duty to call witnesses in an attempt to admit the photocopy of a handwritten document to probate, particularly since she had given Mr. Hutcherson notice that she did not believe the photocopy constituted a valid will.[4]

II.

Because the original of Mrs. Hutcherson's purported testamentary instrument could not be found, a strong presumption arose that Mrs. Hutcherson destroyed or revoked the purported testamentary instrument. *See Hickey v. Beeler*, 171 S.W.2d 277, 279 (Tenn. 1942); *Shrum v. Powell*, 604 S.W.2d 869, 872 (Tenn. Ct. App. 1980); 1 Pritchard § 51, at 73. To rebut this presumption, Mr. Hutcherson had to prove: (1) that the instrument was made and executed in accordance with the forms of law, (2) that the instrument was not revoked, (3) that the original of the instrument has been lost or destroyed, and (4) the contents of the instrument. *In re Estate of Boote*, 198 S.W.3d 699, 726 n.47 (Tenn. Ct. App. 2005); *In re Estate of West*, 729 S.W.2d 676, 678 (Tenn. Ct. App. 1987); Pritchard § 51, at 72-75. Because of the presumption, Mr. Hutcherson had to prove each of these elements by clear and convincing evidence. *Shrum v. Powell*, 604 S.W.2d at 871; *Sanders v. McClanahan*, 442 S.W.2d 664, 667-68 (Tenn. Ct. App. 1969).

[3] Conversely, Tennessee Code Annotated § 39-14-131 makes it a felony for a person having knowledge of a last will or codicil to destroy or conceal it.

[4] Mr. Hutcherson was put on notice that Ms. Vantrease did not believe the photocopy was a valid testamentary instrument. Her petition to the court stated that she was seeking alternative relief, either to probate the instrument or for intestate administration. As a potential beneficiary of the purported holographic will, Mr. Hutcherson was on notice that he should have been prepared to present evidence as to its validity. He was afforded that opportunity and he failed to do so.

However, no evidence was presented by Mr. Hutcherson, or any other party, to rebut the presumption that Mrs. Hutcherson's will was revoked by her. Accordingly, we affirm the trial court's ruling that the evidence was insufficient to establish that the photocopy of the holographic document was the last will and testament of Mrs. Hutcherson.

III.

As for Mr. Hutcherson's contention that he was not allowed to present evidence at the August 17 hearing, there is no evidence in the record that supports his contention. Moreover, it is undisputed that Mr. Hutcherson was represented by counsel at that hearing and that he introduced photographic evidence at the hearing to refute the suggestion that he did not need to reside in his mother's residence. The trial court's second order, entered on November 13, 2007, expressly states that Mr. Hutcherson was offered and waived his opportunity to put on proof regarding the validity of the holographic document at the August hearing. There being nothing in the record to contradict the trial court's ruling on this matter, we affirm the finding that Mr. Hutcherson waived his right to put on proof.

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against John Wesley Hutcherson, Jr.

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FRANK G. CLEMENT, JR., JUDGE